

ORIGINAL



0000144801

RECEIVED

**RYLEY CARLOCK & APPLEWHITE**

One North Central Avenue, Suite 1200 2013 MAY 10 A 11:46

Phoenix, Arizona 85004-4417

Telephone: 602/258-7701

Telecopier: 602/257-9582

Michele L. Van Quathem - 019185

Fredric D. Bellamy - 010767

Attorneys for Wind P1 Mortgage Borrower L.L.C.

Arizona Corporation Commission

**DOCKETED**

MAY 10 2013

DOCKETED BY

*TSM*

**BEFORE THE ARIZONA CORPORATION COMMISSION**

**COMMISSIONERS**

BOB STUMP, Chairman

GARY PIERCE

BRENDA BURNS

BOB BURNS

SUSAN BITTER SMITH

Docket No. SW-02361A-08-0609

IN THE MATTER OF THE APPLICATION OF  
BLACK MOUNTAIN SEWER CORPORATION,  
AN ARIZONA CORPORATION, FOR A  
DETERMINATION OF THE FAIR VALUE OF  
ITS UTILITY PLANT AND PROPERTY AND  
FOR INCREASES IN ITS RATES AND  
CHARGES FOR UTILITY SERVICE BASED  
THEREON

**WIND P1 MORTGAGE BORROWER,  
L.L.C.'S MOTION FOR REHEARING**

Wind P1 Mortgage Borrower L.L.C., doing business as The Boulders Resort (the "Resort"), by and through its undersigned attorneys, respectfully requests a rehearing of the Commission's May 8, 2013 Decision number 73885 (the "Decision") in this matter pursuant to Arizona Revised Statutes section 40-253(A). Further, because the Commission's Decision orders permanent closure of a wastewater reclamation plant that could significantly damage the Resort's golf business operations should the Resort prevail on an appeal of this matter, the Resort requests that the Commission further order a stay of its closure order in this matter pending the resolution of this Motion for Rehearing and any subsequent appeal.

The Resort requests a rehearing of the Decision on the bases explained below:

1    **I.    THE DECISION IS UNLAWFUL, UNREASONABLE, AND ARBITRARY**

2        **1.    Proposed Decision is Unreasonable and Arbitrary**

3        The Commission in considering this matter was acting in a quasi-judicial role and is  
4 therefore charged with taking evidence in a manner similar to a judge. *See State ex rel. Corbin*  
5 *v. Arizona Corp. Comm'n.*, 143 Ariz. 219, 224-25, 693 P.2d 362, 367-68 (Ariz.App.Div.1 1984)  
6 (describing that Commission decisions are subject to judicial review to ensure compliance with  
7 constitutional and legislative requirements, and general due process standards governing quasi-  
8 judicial proceedings). Commission decisions must be supported by substantial evidence and not  
9 speculation. *Arizona Corp. Comm'n. v. Citizens Utilities Co.*, 120 Ariz. 184, 187, 584 P.2d  
10 1175, 1178 (Ariz.App.Div.1 1978). Decisions must also be reasonable. Ariz. Const., Art. 15,  
11 §3; A.R.S. § 40-254. In this case, the Commission's decision is arbitrary because the  
12 Commission had insufficient evidence to support a decision that a forced closure of the Boulders  
13 wastewater reclamation plant (the "WWTP") – a decision made to terminate Black Mountain  
14 Sewer Corporation's ("Black Mountain's") effluent delivery obligation – is a reasonable  
15 solution to address resident complaints about noises and odors. In short, regarding the odor and  
16 noise complaints the Commission seeks to remedy in the Decision, there is no evidence in the  
17 hearing record of:

- 18            • any defect in the design or operation of the WWTP
- 19            • any noncompliance with a law, rule, or industry standard applicable to the WWTP
- 20            • any violation of a required or recommended air quality standard, noise standard, or
- 21            permit requirement
- 22            • any engineering study or measurement of noise or odor levels in any proximity to
- 23            the WWTP
- 24            • any study regarding the costs of fixing the cause of odors and noises emitted by
- 25            the WWTP or how those costs compare to the surcharge authorized by the
- 26            Commission that will allow Black Mountain to collect the capital costs of the
- 27            WWTP closure in advance of a fair value determination in Black Mountain's next
- 28            rate case

1 The Commission determined in Decision No. 71865 (“Phase 1” of this rate case docket)  
2 that the Settlement Agreement entered into between Black Mountain and the Boulders  
3 Homeowners Association (“BHOA”) to close the WWTP voluntarily with a stipulated surcharge  
4 and under certain conditions precedent “represents a reasonable resolution of the current odor  
5 concerns...”,<sup>1</sup> but did not go so far as to find that odors were occurring at any particular level  
6 from the WWTP nor did the Commission find that closure of the WWTP was necessary to  
7 resolve odors. The Commission’s Decision No. 71865 to adopt the proposals in the Settlement  
8 Agreement was based largely upon unsworn public comments,<sup>2</sup> and was secured with the  
9 settling parties’ representation that approval of the Settlement Agreement terms did not require  
10 the Commission to make a determination of whether the WWTP closure, an arguable Black  
11 Mountain management decision, was in the public interest – only whether the surcharge should  
12 be implemented.<sup>3</sup>

13 The Commission in the Phase I rate proceeding had no objective and reliable information  
14 from which the Commission could conclude any particular aspect of the WWTP or its operation  
15 was causing the odors and noises noted in some of the public comments, nor was there any  
16 evidence indicating measured levels of odors and noises at any particular location in proximity  
17 to the WWTP.<sup>4</sup> Despite the fact that some level of noise studies<sup>5</sup> and odor studies<sup>6</sup> or  
18

---

19  
20 <sup>1</sup> Decision No. 71865 at 49:13-18.

21 <sup>2</sup> Decision No. 71865 at 49:19-51:4.

22 <sup>3</sup> Phase 1, Vol. I Tr. at 185:23-187:8; Decision No. 71865 at 45:11-20, 53:7-54:1.

23 <sup>4</sup> The parties’ attorneys discussed the status of the Phase 1 evidentiary record in a Procedural Conference prior to  
24 the Phase 2 hearing. See Transcript of February 7, 2012 Procedural Conference at pp. 33:20-45:19 (discussing  
25 status of public comments and evidence).

26 <sup>5</sup> Decision, p. 10:1-3; Decision 71865, p. 41:1-2; see also Exhibit 3 to BMSC 6 (email from McBride Engineering  
27 indicates preliminary noise evaluation was conducted with equipment and report was to be prepared.)

28 <sup>6</sup> See Exhibit 2 to BMSC 6 (via e-mail on December 17, 2008, Les Peterson (BHOA witness in Phase 1  
proceeding) states “The 4 odor sensors around the Processing Plant indicate that the current odor is not coming  
from the [WWTP].” He then goes on to explain that odor sensors will be installed in a location in the collection  
system.) See also Decision No. 64267, pp. 31:25-26 (“Carter Burgess Report”); 32:21-22 (“LTS Report”) (two

1 measurements were conducted or made in the past, no such objective studies or measurements  
2 of the current level of odors or noises attributable to the WWTP or the radius impacted were  
3 offered into evidence by any party.<sup>7</sup> Prior to Phase 1, Black Mountain undertook a number of  
4 remedial measures to various facilities (primarily in the collection system of pipes, manholes,  
5 and pumping stations) as are summarized in Decision No. 71865 at pages 40-41, and witnesses  
6 indicated the measures helped,<sup>8</sup> but the Commission has since then been provided with no  
7 objective measurements of the improvement or lack thereof in relation to the WWTP (as  
8 opposed to the collection system).<sup>9</sup>

9 In this case, the Commission was asked to rely on the former record in Phase 1 of this  
10 docket, and additional stipulated facts offered by BHOA and Black Mountain<sup>10</sup> that make very  
11 general statements regarding the existence of complaints lodged in the Commission's docket  
12 about odor and occasional noises that residents attribute to the WWTP. Subsequent testimony at  
13 the Phase 2 hearing on May 8, 2012, indicated that many of the Company's 23 logged odor  
14 complaints reflected in the stipulated facts were unrelated to the WWTP, and there had been  
15 only one noise complaint made to the Company from the homeowner closest to the WWTP.<sup>11</sup>  
16 The mere fact that such complaints have been made as is described in the stipulated facts, which  
17 is not disputed, is insufficient to justify the Commission's order to force a closure of the  
18 WWTP. There is no objective or reliable basis in the record for the Commission or Black  
19 Mountain's customers (including the Resort) to determine the cause of the problem, the severity  
20

---

21 studies made prior to most recent noise and odor improvements described in Phase I). *See also* Decision,  
22 p.10:12-15 (odor loggers were installed at WWTP at some point).

23 <sup>7</sup> Decision 71865, pp. 40:19-41:6 (description of changes made to the WWTP to resolve odor and noise  
24 complaints noted in prior case and results); *see also* Decision, pp. 16:21-17:7 (Mr. Rigsby, a regular Residential  
Utility Consumer Office witness in ACC matters, also expressed a concern that the Commission should  
ascertain the source of the odors before adopting the Settlement Agreement in Phase 1.).

25 <sup>8</sup> *See, for example*, BHOA-4 at 5:14-21 (Les Peterson testified odors are less frequent).

26 <sup>9</sup> Decision No. 71865 at 40-41; *see also* Exhibit A-1, Sorenson Direct, at pp. 2:17-8:25.

27 <sup>10</sup> Decision at 44:10-28.

28 <sup>11</sup> Ex. W-6. *See also* Phase 2 Tr. at 157:2-159:21.

1 of the problem, how many people are unreasonably affected by the problem, or whether WWTP  
2 closure, which the Commission determined will have a substantial cost charged to all customers  
3 through a rate surcharge, is a reasonable remedy to address the problem.

4           **2. Proposed Order Violates R14-3-104(A), R14-3-109(F), (N) and 105(C), and**  
5           **A.R.S. § 41-1062(A)**

6           By a Motion to Strike filed on **February** 11, 2013, the Resort objected to the admission  
7 of individual public comments and descriptions of the content of such comments (except as such  
8 comments were described in the stipulated facts) because admission of the content of such  
9 comments for the truth of the matters asserted therein violates the Commission's rules regarding  
10 submission of unsworn testimony and public comment, and, even if characterized in the  
11 Decision as something that cannot be relied upon for the Commission's decision, the very  
12 inclusion of the detailed summaries of the substantive content of such comments demonstrates  
13 *de facto* reliance and prejudices a fair consideration of the evidence. The Resort moved to strike  
14 the following references to the substantive content of public comments from the Recommended  
15 Order and Opinion, but the references were not removed and were instead adopted verbatim in  
16 the Decision:

- 17           • page 2: lines 8-10
- 18           • page 2: lines 23-27
- 19           • page 4: lines 6-7 and footnote 2
- 20           • page 4: lines 19-24 through page 5: line 1 and footnote 3
- 21           • page 19: line 1 through page 20: line 15, including footnotes<sup>12</sup>

---

22  
23  
24 <sup>12</sup> This section summarizes the substance of public comment summaries included in the prior Commission  
25 decision in Phase I of this docket, but is included in the Resort's objection because, since that time, this case  
26 changed from a rate case in which approval of a last-minute surcharge agreement between parties was  
27 considered, to a different proceeding with a new party to determine whether the Commission should invoke its  
28 legal authority to order closure of a used and useful facility solely on the basis of public comfort or  
convenience. The Commission provided the parties a formal hearing format to establish an evidentiary record  
for the new decision, and there is no permissible reason for inclusion of unsworn evidence in the Decision in  
violation of the Commission's rules.

- 1       • page 27: lines 2 through 4<sup>13</sup>
- 2       • page 27: lines 5 through 7<sup>14</sup>
- 3       • page 45: lines 4-6
- 4       • page 45: line 8
- 5       • page 47: lines 4-5
- 6       • page 47: lines 15-19
- 7       • page 49: lines 12-13

8           Prior to issuing the Recommended Order and Opinion in this matter on February 6, 2013,  
9 the Resort was provided with no notice that the Administrative Law Judge or Commission  
10 intended to rely on the substantive content of the above-referenced unsworn public comments as  
11 evidence of the matters asserted therein to support the Decision in this matter. *See* A.R.S. § 41-  
12 1062(A)(3) (judicial notice requires notice to parties before or at the hearing). No ruling was  
13 made by the Administrative Law Judge on the Resort's Motion to Strike, but the motion was  
14 essentially denied through the Commission's adoption of the Decision in its current form.

15           In the Decision, certain individual persons making public comments are identified (see  
16 list of pages and line numbers above for references), and the substance of their individual  
17 comments and unsworn positions are being quoted in the Decision to support the order to close  
18 the WWTP. *See, for example*, pp. 19:1-5, 20:13-15, 20:21-22 (relying on the content of public  
19 comments for "levels and frequencies" of odors; "almost unanimous support by customers for  
20

---

21 <sup>13</sup> The phrase "the offensive odors continue to be as severe, if not worse, since the issuance of Decision No. 71865  
22 in 2010" is based upon public comment. The BHOA offered no witnesses in the Phase 2 hearing, and relied  
solely on the stipulated facts. This phrase is not included in the stipulated facts.

23 <sup>14</sup> The Town of Carefree intervened in Phase 1, but, although it has been represented by an attorney in this matter,  
24 did not request admission of its public comment into evidence at the hearing as required in rule R14-3-109(N)  
25 in order for the resolution to be considered, and for the Resort to have an opportunity under that rule for  
26 rebuttal. As noted in the Decision, BHOA's attorney "filed" a full copy in the docket on November 22, 2011,  
27 but also did not request admission of the public comment into evidence at the subsequent hearing on May 8,  
28 2012. The Resort objects to de facto admission of the Resolution in the Decision because no foundation has  
been offered for the resolution or assertions made by the Town in the Petition, the Resort has not had an  
opportunity to cross-examine the witness offering the resolution, nor was the Resort notified before or at the  
hearing that the resolution would be considered or relied upon by the Commission.

1 closing the plant”, and stating that public comment provides “useful insight”); *see also* p. 20:13-  
2 15 (“...the public comments ... made clear that customers ... have endured and continue to endure  
3 offensive odors...”); pp. 45:3-10 (Commission relies on public comments for its decision).  
4 Some references in the Decision are to public comments docketed years ago with no foundation  
5 provided regarding the individual commenter or the basis of the opinion.

6 Why does the Commission refuse to remove the public comment references from the  
7 written Decision when the Commission agrees in the same Decision they are not evidence?<sup>15</sup>  
8 The Resort objected, and continues to object, to the admission into evidence of any of such  
9 comments as the public comments are (1) unsworn and (2) even though the comments are  
10 quoted and summarized in the Decision to justify a decision adverse to the Resort, the Resort  
11 was denied any opportunity to cross-examine the persons providing those comments in violation  
12 of law. *See* A.R.S. § 41-1062(A)(1) (every party shall have the right of cross-examination).  
13 The Resort again requests that the public comment references be stricken, or at the very least  
14 that the Resort be provided with the opportunity to cross-examine those persons referred to in  
15 the Decision under oath.

16 The Commission’s rules require that “[a]ll testimony to be considered by the Commission  
17 in formal hearings shall be under oath, except matters of which judicial notice is taken or  
18 entered by stipulation.” A.A.C. R14-3-109(F). The rules further make clear that consumers  
19 appearing and making public comments “shall not be deemed a party to the proceedings.” R14-  
20 3-105(C). There is a good reason for these rules as they provide the means to ensure evidence to  
21 be relied upon by the Commission is reliable and presented in an orderly fashion. Public  
22 comments, on the other hand, can be submitted by anyone at any time, and repeatedly by the  
23 same person, whether or not they have any standing or interest, or even a conflict of interest in  
24 the matter, and the Commission makes no effort to verify the identify of the commenter, the  
25 veracity of the statement, or other foundation for the comments per evidentiary rules.

---

26  
27 <sup>15</sup> Decision, p. 19:3.  
28

1 The Resort has the right under the Commission's rule R14-3-104(A) and Arizona  
2 Revised Statutes section 41-1062(A)(1) to cross-examine those persons referred to in the  
3 Decision at a minimum regarding the substantive opinions quoted in support of the Decision, but  
4 the Resort has been denied this right in violation of the Arizona Administrative Procedure Act,  
5 the Commission's own rule and basic due process. *See Tucson Warehouse & Transfer Co. v.*  
6 *Al's Transfer, Inc.*, 77 Ariz. 323, 327, 271 P.2d 477, 479-80 (1954) (Commission bound by its  
7 own procedural rules).

8 **3. The Decision is Not in Accordance with the Commission's Rules for Sewer**  
9 **Facilities and Service**

10 The Commission's regulation interpreting the level of service to be provided by a sewer  
11 utility is Arizona Administrative Code section R14-2-607. Section R14-2-607 provides that  
12 each "utility shall be responsible for the safe conduct and handling of the sewage from the  
13 customer's point of collection," along with a duty to "make reasonable efforts to supply a  
14 satisfactory and continuous level of service." In this case, the Commission found that Black  
15 Mountain's provision of service to its customers through use of the Plant is in compliance with  
16 all legal requirements, including this rule.<sup>16</sup> No evidence has been presented that establishes that  
17 Black Mountain's handling of sewage from the customer's point of collection is unsafe,  
18 unsatisfactory, or non-continuous, and there was no finding that Black Mountain's provision of  
19 sewer service was not reasonably satisfactory or non-continuous.

20 As to the standard required for a sewer provider's facilities, the same Commission rule  
21 requires that the "design, construction and operation of all sewer plants shall conform to the  
22 requirements of the Arizona Department of Health Services or its successors and any other  
23 governmental agency having jurisdiction thereof." *Id.* Through the Arizona Environmental  
24 Quality Act of 1986, the Arizona Department of Health Services' regulatory authority over  
25 sewer treatment facilities was assumed by the newly-created Arizona Department of

---

26  
27 <sup>16</sup> Decision, p. 48:25-27.  
28



1 Environmental Quality (“ADEQ”)<sup>17</sup>, and some portions of ADEQ’s regulatory authority are  
2 administered by the Maricopa County Environmental Service Division (“MCESD”) through a  
3 delegation agreement. The evidence established that the WWTP is in compliance with all  
4 ADEQ design, construction, and operation requirements. There is no evidence indicating that  
5 noise or odor levels exceed ADEQ’s or MCESD’s standards, or even that any permit violations  
6 related to noise or odor at the WWTP have occurred. The Commission must follow its own  
7 rules, *Clay v. Arizona Interscholastic Ass’n, Inc.*, 161 Ariz. 474, 476, 779 P.2d 349, 351 (1989),  
8 citing *Gibbons v. Ariz. Corp. Comm’n*, 95 Ariz. 343, 390 P.2d 582 (1964) (other internal  
9 citations omitted), and a decision inconsistent with its own rules regarding the measurement of  
10 the sufficiency of the WWTP and sewer service is unlawful and unreasonable.

## 11 **II. THE DECISION IS UNCONSTITUTIONAL**

### 12 **1. Contract Impairment**

13 The Decision unconstitutionally deprives the Resort of its contractual rights to continued  
14 effluent delivery through March 2021. Article I of the United States Constitution and Article 2,  
15 Section 25 of the Arizona Constitution prohibit the State from passing any law that impairs the  
16 obligation of a contract. The State can only impair contract obligations in the exercise of its  
17 inherent police power to safeguard vital public interests. *Phelps Dodge Corp. v. Arizona Elec.*  
18 *Power Co-op, Inc.*, 207 Ariz. 95, 119, 83 P.3d 573, 597 (App.Div.1 2004), review den’d  
19 (internal citations omitted) (“*Phelps Dodge*”). Here, the Commission’s powers are further  
20 limited to those derived expressly from the Constitution or through express legislative  
21 delegation; the Commission has no implied powers. *Id.* at 111, 589 (internal citations omitted);  
22 *Trico Elec. Co-Op. v. Ralston*, 67 Ariz. 358, 365, 196 P.2d 470, 474 (1948) (“The Corporation  
23 Commission has no implied powers and its powers are limited to those derived from a strict  
24 construction of the Constitution and implementing statutes.”); see also *Tonto Creek Estates*  
25

---

26 <sup>17</sup> See history at <http://www.azdeq.gov/function/about/history.html>.  
27  
28

1 *Homeowners Ass'n v. Ariz. Corp. Comm'n*, 177 Ariz. 49, 55, 864 P.2d 943, 949 (1946) ("The  
2 Corporation Commission's powers are limited and do not exceed those to be derived from a  
3 strict construction of the Constitution and implementing statutes."); *US West Communications,*  
4 *Inc. v. Ariz. Corp. Comm'n*, 197 Ariz. 16, 23, ¶28, 3 P.3d 936, 943 (App. 1999) (The  
5 Commission's powers are limited to those declared in the constitution and implementing  
6 statutes.").

7 To determine whether the Commission exercises its powers properly under constitutional  
8 contract impairment provisions, a court will look at a three-part test. *Id.* at 119, 597, citing  
9 *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410, 103 S.Ct. 697,  
10 74 L.Ed.2d 569 (1983); *McClead v. Pima County*, 174 Ariz. 348, 359, 849 P.2d 1378, 1389  
11 (App. 1992). First, the Court will determine whether the order substantially impairs a  
12 contractual relationship. *Id.* The severity of the impairment will increase the level of scrutiny of  
13 the impairment. *Energy Reserves*, 459 U.S. at 411. Second, if there is substantial impairment,  
14 then the Commission would need to identify a significant and legitimate purpose to justify the  
15 order. *Phelps Dodge*, at 119, 597. Finally, if such a purpose exists, then the Commission would  
16 need to demonstrate that the adjustment of the parties' contractual obligations is reasonable and  
17 appropriate to the public purpose justifying the order. *Id.*

18 The first part of this test is substantial impairment of a contract, and this test is easily met  
19 by the Decision. An impairment occurs "when the legislative enactment changes the obligation  
20 in favor of one party against another, either by enlarging or reducing the obligation." *Phelps*  
21 *Dodge*, 418 Ariz. at 122, 83 P.3d at 600, quoting from *Picture Rocks Fire District v. Pima*  
22 *County*, 152 Ariz. 442, 444, 733 P.2d 639, 641 (App. 1986). In this case, there is no question  
23 that the Decision substantially impaired a contract - in fact, it was a purpose of the Decision to  
24 do so. See Decision, p. 46:9-10 ("our actions . . . reflect[] the least amount of governmental  
25 intrusion possible on the Company's operations"). Black Mountain does not need the  
26 Commission's approval to close a plant, which is a utility management decision. In this case,  
27 the primary purpose of the party requesting the proposed order was to provide Black Mountain  
28 with a contract defense by which Black Mountain could terminate the core obligation in its

1 contract to deliver effluent, the Effluent Agreement (the “Agreement”), “at little or no cost” to  
2 Black Mountain. *See* Decision, p. 2:11-14 (BHOA’s motion requests closure of the WWTP to  
3 “thereby [relieve] BMSC of its contractual obligation to provide effluent to the Resort...”); p.  
4 32:16-17 (“BHOA claims that the only remaining obstacle to closure of the plant is BMSC’s  
5 contractual obligation with the Resort.”); p. 49:14-15 (“BMSC and the Boulders Resort have  
6 been unable to reach agreement for the termination of the Effluent Agreement at little or no cost  
7 to the Company.”) The purpose of securing the Decision was to provide a means by which  
8 Black Mountain might justify terminating the Resort’s right to receive water from the WWTP  
9 from the closure date through March 2021, the remaining term of the Agreement.<sup>18</sup> The  
10 undisputed evidence demonstrated the Resort’s right to continued water deliveries for the  
11 remaining years in the Agreement is a valuable contract right. Evidence was presented that the  
12 costs of obtaining replacement supplies and the associated infrastructure, if such replacement  
13 supplies are even available given the difficulties explained in the evidence, are in the millions of  
14 dollars.<sup>19</sup>

15 The second part of the test for unconstitutional impairment of contracts requires that the  
16 Commission identify a significant and legitimate purpose for the impairment. The Decision  
17 states that the Commission is relying upon the Commission’s powers in Article XV, section 3 of  
18 the Arizona Constitution, and A.R.S. sections 40-202(A),<sup>20</sup> 40-321(A), 40-331(A), and 40-  
19 361(B) that identify public “health,” “safety,” “comfort,” “convenience,” and “security”  
20 interests.<sup>21</sup> As an initial matter, the evidence demonstrates no health and safety endangerment,  
21  
22

---

23 <sup>18</sup> See Decision at 31:1-4.

24 <sup>19</sup> Wind P1 Mortgage Borrower, LLC Initial Closing Brief and portions of record cited therein, docketed June 12,  
25 2012, pp. 9:12-11:5.

26 <sup>20</sup> A.R.S. § 40-202(A) has been held to grant the Commission no power in addition to those powers it already  
27 possesses under the Constitution. *Phelps Dodge Corp. v. Ariz. Elec. Power Co-Op., Inc.* 207 Ariz. 95, 112, 83  
28 P.3d 573, 590 (2004) (internal citation omitted).

<sup>21</sup> Decision at p. 50:1-5.

1 and no security threat related to continued operation of the WWTP.<sup>22</sup> The Commission found  
2 the WWTP is operated in full compliance with all applicable law and industry standards.<sup>23</sup> No  
3 measurements of odor or noise levels at any location were offered into evidence, no qualified  
4 professional investigation of the source of the odors occurred, and no comparisons were made  
5 between measured odor or noise levels or any health or safety standards. The Decision finds  
6 only that resident complaints have been made regarding odors and noises that residents attribute  
7 to the plant.<sup>24</sup>

8 The Decision therefore apparently purports to rely on the “public comfort” and “public  
9 convenience” language in the cited authorities, but such public utility commission authorities do  
10 not extend to the facts in this case because the Commission found that the plant is used and  
11 useful in the service of customers and the plant and utility service are in compliance with all  
12 laws and industry standards. The vague “public comfort” and “public convenience” phrases in  
13 the Arizona Constitution are part of the law, and, assuming they apply to this case despite the  
14 fact the Commission found utility service is adequate, the Commission’s findings indicate the  
15 plant is in compliance with all laws under its limited jurisdiction.

16 The third requirement of the constitutional contract impairment test is that exercise of  
17 such power must be based upon reasonable conditions of a character appropriate to the public  
18 purpose justifying the Order’s issuance. *Energy Reserves*, 459 U.S. at 413; *Phelps Dodge*, 207  
19 Ariz. at 119, 83 P.3d at 597. Even though there is usually a presumption favoring legislative  
20 judgment as to the necessity and reasonableness of a particular measure, when legislation  
21 impairs one specific existing contract as in this case, there must be a demonstration in the record  
22 that the severe disruption of contractual expectations is necessary to meet an important general  
23 social problem. *See Allied Structural Steel Company v. Spannus*, 438 U.S. 234-51, 242-98 S.Ct.

---

25 <sup>22</sup> Decision at pp. 10:13-15 and 49:4-6.

26 <sup>23</sup> Decision at pp. 49:4-6.

27 <sup>24</sup> Decision at p. 49:14-20.

1 2716, 2721-26 (1978); *see also* *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 23, 97  
2 S.Ct. 1505, 1518 (1977). This is a targeted order involving one facility and one contract that  
3 will have a severe disruptive effect on contract expectations. There is insufficient evidence that  
4 the closure of the plant is a necessary or reasonable remedy to meet an important general social  
5 problem.

6 Even if the bare fact that customer complaints were made about odors and noises was  
7 enough alone to support the Decision, closure was not the only option available to the  
8 Commission to address the BHOA's concerns. The Commission could have rejected the  
9 Decision and allowed the parties to continue working on an agreed solution that addressed all  
10 parties' interests. The Commission could have ordered the Company to reduce odors and noises  
11 further to address customer complaints and let the Company determine how best to comply.  
12 Although no study of plant odors was conducted, the Commission's own staff engineer  
13 indicated that it may be possible to further reduce odors at the plant by enclosing it,<sup>25</sup> but that  
14 installation of an additional or larger odor scrubber was probably the most cost effective  
15 solution.<sup>26</sup> The Commission could have ordered Black Mountain to pursue an alternative that  
16 includes Black Mountain's continued provision of effluent to the Resort. Black Mountain could  
17 send wastewater to the new Cave Creek treatment plant so that effluent could be made available  
18 to the Resort.<sup>27</sup> The Decision proposes no remedy whatsoever for taking the Resort's valuable  
19 contract right and eliminating its effluent service.

20 The Commission took the position some time ago that the Resort is an effluent customer  
21 of Black Mountain and set rates for Black Mountain's effluent deliveries on its tariff,<sup>28</sup> yet the  
22

---

23  
24 <sup>25</sup> November 25, 2009 Hearing Tr., Vol. IV, SW-02361A-08-0609 ("Phase I Tr., Vol. IV") at 653:4-24.

25 <sup>26</sup> *Id.* at 652:19-654:24. *See also* May 8, 2012 Hearing Transcript ("Phase 2 Tr.") at 162:16-164:10, 186:5-16, Ex. BMSC-3.

26 <sup>27</sup> Phase 2 Tr. at 116:23-120:2, 128:17-23, 140:22-141:21.

27 <sup>28</sup> Black Mountain also provides sewer treatment services to the Resort. *See* Ex. W-1, p.5. *See also* Decision No. 50544 (prior effluent agreement approved in 1980).  
28

1 Decision effectively ends effluent water service altogether, raising questions about the  
2 Commission's jurisdiction to regulate effluent deliveries, service obligations, and the Decision's  
3 termination of one customer's service to make an elective facility change in favor of another  
4 customer group. These issues may subject the decision to less deference under the above-quoted  
5 constitutional requirements. *See also* Ariz. Const. Art. XV, §12 (prohibiting discrimination in  
6 charges, service, or facilities between persons or places for rendering a like and  
7 contemporaneous service).

## 8           **2. Due Process and Equal Protection**

9           The Decision violates the due process Amendment 14 of the United States Constitution  
10 and Article 2, section 4 of Arizona's Constitution because the Decision is not reasonably related  
11 to a legitimate state interest. As discussed in the prior section, the Commission is an  
12 administrative agency of limited jurisdiction. As a body with limited jurisdiction, the  
13 Commission can rely only on powers specifically granted to it in the Arizona Constitution or  
14 statutes. In addition, in exercising its granted powers, the Arizona Constitution requires that the  
15 Commission's actions be reasonable, which means that the Commission can only take actions in  
16 furtherance of a legitimate state interest if there is substantial evidence supporting the  
17 reasonableness of the Commission's exercise of the granted power. There must be interim  
18 evidence that justifies the reasonableness of the Commission's ultimate decision. *See, for*  
19 *example, RUCO v. Arizona Corporation Commission*, 199 Ariz. 588, 593, 20 P.3d 1169, 1174  
20 (Ariz.App.Div. 1 2001) (public is entitled to due process protection that reasonableness and  
21 justness of rate finding be related to a finding of fair value); *Scates v. Arizona Corporation*  
22 *Commission*, 119 Ariz. 531, 534, 578 P.2d 612, 615 (Ariz.App.Div.1 1978) (Commission must  
23 act intelligently, justly, and fairly by ascertaining fair value of property in order to justify the  
24 reasonableness of its rate decision).

1 The Commission in the Decision states that it is relying on powers in Article XV, section  
2 3 of the Arizona Constitution, and A.R.S. sections 40-202(A),<sup>29</sup> 40-321(A), 40-331(A), and 40-  
3 361(B). Article XV, Section 3 provides, in relevant part:

4 The corporation commission shall have full power to, and shall, prescribe just and  
5 reasonable classifications to be used and just and reasonable rates and charges to  
6 be made and collected, by public service corporations within the state for service  
7 rendered therein, and make reasonable rules, regulations, and orders, by which  
8 such corporations shall be governed in the transaction of business within the state,  
9 and may prescribe the forms of contracts and the systems of keeping accounts to  
be used by such corporations in transacting such business, *and make and enforce  
reasonable rules, regulations, and orders for the convenience, comfort, and  
safety, and the preservation of the health, of the employees and patrons of such  
corporations; ....*

10 As stated in the prior section, the evidence demonstrates no health and safety endangerment, and  
11 no security threat related to the continued operation of the WWTP. The Commission found the  
12 WWTP is operated in full compliance with all applicable law and industry standards.<sup>30</sup> The  
13 Commission found generally that there had been resident and golfer complaints regarding odors  
14 and noises attributed by the complainants to the WWTP,<sup>31</sup> and made findings about the location  
15 of the WWTP in comparison to various residences,<sup>32</sup> but made no measurements of noise or odor  
16 levels at any location or distance from the WWTP, and identified no standard or location in  
17 proximity to the WWTP where odor levels and noises for an existing facility were reasonable or  
18 unreasonable. The Commission considered no alternatives to closure of WWTP that would  
19 reduce odors and noises to a reasonable level, either from a technical feasibility perspective or  
20 from a cost perspective, so there is no way to compare the cost, feasibility, or reasonableness of  
21 the WWTP closure order as compared to any other action that could be taken to address the  
22

---

23  
24 <sup>29</sup> A.R.S. § 40-202(A) has been held to grant the Commission no power in addition to those powers it already  
possesses under the Constitution. *Phelps Dodge Corp. v. Ariz. Elec. Power Co-Op., Inc.* 207 Ariz. 95, 112, 83  
25 P.3d 573, 590 (2004) (internal citation omitted).

26 <sup>30</sup> Decision at p. 49:4-6.

27 <sup>31</sup> Decision at p. 48:14-20.

28 <sup>32</sup> Decision at p. 48:12-13.

1 complaints. The language in Article 15, Section 3 above grants the Commission no specific  
2 authority to make a retroactive plant siting or zoning decision under the guise of the vague  
3 phrases “public convenience” or “public comfort.” But even if one or both of these phrases  
4 were held to provide that sort of authority to the Commission, there is no substantial evidence  
5 that justifies the Commission’s Decision under an articulated standard of odor or noise  
6 performance, comfort, or convenience, for the WWTP.

7 There is similarly no substantial evidence that justifies the Commission’s Decision under  
8 the cited statutory authorities. Per Article 15, Section 6 of the Arizona Constitution, the Arizona  
9 Legislature may enlarge the powers and duties of the Commission, and “may prescribe  
10 reasonable rules and regulations to govern proceedings” brought before the Commission.  
11 Decisions under statutory powers must also be reasonable. A.R.S. § 4-254(A). The Legislature  
12 has added some specific powers to the Commission’s constitutional powers regarding the  
13 regulation of rates and utility service, but none of the provisions cited by the Commission grant  
14 it authority to make a retroactive plant siting or zoning decision regarding a company’s existing  
15 facilities that are operated in full compliance with all applicable law and industry standards,  
16 including the Commission’s own rules.

17 Section 40-202(A), relied upon by the Commission for the Decision provides in relevant  
18 part:

19 The commission may supervise and regulate every public service corporation in  
20 the state and do all things, whether specifically designated in this title or in  
21 addition thereto, necessary and convenient in the exercise of that power and  
jurisdiction....

22 This vague language has been held to grant the Commission no power in addition to those  
23 powers it already possesses under the Constitution. *Phelps Dodge Corp. v. Ariz. Elec. Power*  
24 *Co-Op., Inc.* 207 Ariz. 95, 112, 83 P.3d 573, 590 (2004) (internal citation omitted).

25 Section 40-321(A), also cited in the Decision, states as follows:

26 When the commission finds that the equipment, appliances, facilities or service of  
27 any public service corporation, or the methods of manufacture, distribution,  
28 transmission, storage or supply employed by it, are unjust, unreasonable, unsafe,  
improper, inadequate or insufficient, the commission shall determine what is just,



1 reasonable, safe, proper, adequate or sufficient, and shall enforce its determination  
2 by order or regulation.

3 Application of this section 40-321(A) would have required the Commission find that the WWTP  
4 or Black Mountain's service are "unjust, unreasonable, unsafe, improper, inadequate or  
5 insufficient," and then also find "what is safe, proper, adequate or sufficient." In this case, the  
6 Commission found the WWTP "is operated in full compliance with all applicable law and  
7 industry standards" and further found that "BMSC has taken steps to minimize odors and noises  
8 from the operation of the facility, including, among other improvements, the installation of an  
9 odor scrubber."<sup>33</sup> Despite this finding of legal sufficiency and recent facility changes, and  
10 evidence that the WWTP has been operated in the same location near homes for over 40 years,  
11 the Commission found that "due to its location, the Boulders WWTP can no longer be operated  
12 in a manner consistent with the public interest."<sup>34</sup> (See also Section II.1, below.) The  
13 Commission does not identify any factor regarding the WWTP, including its design, operation,  
14 or location, that has negatively changed in recent years, other than perhaps the noted resident  
15 complaints. Aside from the fact that the public interest is usually measured by compliance with  
16 applicable laws and standards, the Commission identified no established rule or even  
17 recommended standards for the location of existing wastewater treatment plants, or odors and  
18 noise emissions from existing plants, that would be deemed just, reasonable, proper, adequate or  
19 sufficient, so this statutory section is not applicable.

20 The Commission further relied on section 40-331(A) that provides:

21 When the commission finds that additions or improvements to or changes in the  
22 existing plant or physical properties of a public service corporation ought  
23 reasonably to be made, or that a new structure or structures should be erected, to  
24 promote the security or convenience of its employees or the public, the  
25 commission shall make and serve an order directing that such changes be made or  
26 such structure be erected in the manner and within the time specified in the order.  
27 If the commission orders erection of a new structure, it may also fix the site  
28 thereof.

---

26 <sup>33</sup> Decision at 49:4-6.

27 <sup>34</sup> Decision at 49:16-17.

1 The application of this section suffers from the same defect in reasonableness discussed above,  
2 and it does not appear there is any “convenience” issue here anyway as sewer collection utility  
3 service to each home would be the same before and after any change in the off-site plant  
4 location. In this case there is no reasonable basis in evidence for the Commission to order  
5 closure of the plant to effect a retroactive plant siting decision in favor of neighboring residents  
6 when it has found that utility service and the WWTP meet all utility service standards.

7 The application of section 40-361, cited in the Decision, is also defective for the same  
8 reasons discussed above. That section requires “[e]very public service corporation shall furnish  
9 such ... equipment and facilities as will promote the safety, health, comfort and convenience of  
10 its patrons, employees and the public, and as will be in all respect adequate efficient and  
11 reasonable.” The Commission had no basis in the evidence upon which reasonableness can be  
12 determined, and so the Decision violates constitutional due process protections.

13 **a. Equal Protection**

14 The arbitrariness of the Decision and failure of the Commission to rely on a discernable  
15 standard related to the design, operation, or odor and noise emissions of the WWTP as  
16 compared to the Commission’s current rules applicable to all other similarly-situated sewer  
17 utilities, existing plants, and customers (see Section I.3, above), underscore that the  
18 Commission’s Decision discriminates as a new special law applicable to only one private sewer  
19 company, one effluent service customer, and one wastewater reclamation facility under the  
20 Commission’s jurisdiction. The Commission cannot deny here that the potential for a  
21 wastewater reclamation plant to emit odors and noises is a foreseeable event or a circumstance  
22 capable of being controlled by a rule of general application, and the Commission indeed already  
23 applies its own rules and ADEQ standards (measurable standards that are precisely targeted to  
24 those foreseeable events) in other cases. There is no reasonable justification in this case for  
25 application of a new, special law to this particular facility, or class of customer, that cannot be  
26 addressed to all wastewater reclamation facilities and similarly-situated customers under the  
27 Commission’s jurisdiction, and for this reason the Decision violates the equal protection clause  
28

of the Arizona Constitution, Article 2, Section 13, and Amendment 5 of the United States Constitution.

**III. CONCLUSION**

For all the reasons stated above, the Commission should grant a rehearing to reverse the Decision.

RESPECTFULLY SUBMITTED this 10<sup>th</sup> day of May, 2013.

RYLEY CARLOCK & APPLEWHITE

By Michele Van Quathem  
Michele Van Quathem  
Fredric D. Bellamy  
One North Central Avenue, Suite 1200  
Phoenix, Arizona 85004-4417  
Attorneys for Wind P1 Mortgage Borrower L.L.C.  
[mvanquathem@rcalaw.com](mailto:mvanquathem@rcalaw.com)

ORIGINAL and 13 copies of the foregoing  
filed this 10<sup>th</sup> day of May, 2013, with:

Docket Control  
Arizona Corporation Commission  
1200 West Washington  
Phoenix, Arizona 85007

COPY of the foregoing mailed this  
10<sup>th</sup> day of May, 2013, to:

Lyn Farmer, Chief Administrative Law Judge  
Dwight D. Nodes, Asst. Chief ALJ  
Arizona Corporation Commission  
1200 W. Washington St.  
Phoenix, Arizona 85007

Janice Alward, Chief Counsel  
Robin Mitchell  
Legal Division  
Arizona Corporation Commission  
1200 W. Washington St.  
Phoenix, Arizona 85007  
[rmitchell@azcc.gov](mailto:rmitchell@azcc.gov)

Steve Olea, Director  
Utilities Division  
Arizona Corporation Commission  
1200 W. Washington St.  
Phoenix, Arizona 85007

Greg Sorenson  
Algonquin Water Services  
12725 W. Indian School Road, Suite D-101  
Avondale, Arizona 85392-9524

1 Patrick Quinn, Director  
2 Michelle Wood  
3 Residential Utility Consumer Office  
4 1110 W. Washington St., Suite 220  
5 Phoenix, Arizona 85007-2958  
6 mwood@azruco.gov

7 Scott S. Wakefield  
8 Ridenour, Hinton & Lewis, P.L.L.C.  
9 201 N. Central Ave., Suite 3300  
10 Phoenix, Arizona 85004-1052  
11 Attorneys for Boulders HOA  
12 sswakefield@rhhklaw.com

13 Dr. Dennis E. Doelle, D.D.S.  
14 7223 E. Carefree Drive  
15 P.O. Box 2506  
16 Carefree, Arizona 85377-2506

17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
By



Jay L. Shapiro  
Norman D. James  
Fennemore Craig, PC  
3003 N. Central Ave., Suite 2600  
Phoenix, Arizona 85012-2913  
Attorneys for Black Mountain Sewer Corp.  
jshapiro@fclaw.com

Michael W. Wright  
Sherman & Howard, LLC  
7033 E. Greenway Parkway, Suite 250  
Scottsdale, Arizona 85254-8110  
Attorneys for Town of Carefree  
mwright@shermanhoward.com

M. M. Shirtzinger  
34773 N. Indian Camp Trail  
Scottsdale, Arizona 85266-6212